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IN THE

Supreme Court of the United States

October Term, 1962.

No. 437

PEOPLE *ex rel.* EDWARD STOCK,
Plaintiff-Appellant,

vs.

CHRISTOPHER F. TERRENCE, M.D., Director, Rochester State Hospital,
Defendant-Respondent.

Action No. 1.

PEOPLE *ex rel.* EDWARD STOCK,
Plaintiff-Appellant,

vs.

CHRISTOPHER F. TERRENCE, M.D., Director, Rochester State Hospital,
Defendant-Respondent.

Action No. 2.

ON APPEAL FROM THE NEW YORK STATE COURT OF APPEALS.

JURISDICTIONAL STATEMENT.

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Index.

	Page
Index.	
Jurisdictional Statement	2
Opinions Below	2
Jurisdiction	3
Statutes Involved	4
Questions Presented	10
Statement of Case	11
There Is Presented a Substantial Federal Question	14

CASES CITED:

American Express Co. v. Michigan, 177 U. S. 404, 406	3
American Land Co. v. Zeiss, 219 U. S. 47	22
Bandini Co. v. Superior Court, 284 U. S. 8	3
Bryant v. Zimmerman, 278 U. S. 63	3
Central of Georgia Ry. v. Wright, 207 U. S. 127, 138	24
Coates, In Re, 9 N. Y. 2d 242, 213 N. Y. S. 2d 74	13, 14, 15, 16, 20, 26, 27
Coates v. Walters, 368 U. S. 34	14
Coe v. Armour Fertilizer Works, 237 U. S. 413	22
Cornell, In re, 111 Vt. 525, 18 A. 2d 304	29
Dahnke-Walker Co. v. Bondurant, 257 U. S. 282	3

Page

Davis v. Corbin, 112 U. S. 36, 40 3

Detroit & Mackinac Ry. Co. v. Mich. R. R. Comm., 240 U. S. 564 3

Dohany v. Rogers, 281 U. S. 326 22

Eureka Pipe Line Co. v. Hallanan, 257 U. S. 265 3

Grannis v. Ordean, 234 U. S. 358, 394 22

Hurwitz v. North, 371 U. S. 40 22

McPherson v. Blacker, 146 U. S. 1, 24 3

Milliken v. Meyer, 311 U. S. 457 22

Mount Vernon Cotton Co. v. Alabama Power Co., 240 U. S. 30 3

Mullane v. Central Hanover & Trust Co., 339 U. S. 306, 70 S. Ct. 652 ..... 18, 19, 21, 22

People ex rel. Morriale v. Branham, 291 N. Y. 312, 52 N. E. 2d 881 ..... 19, 27, 28

People ex rel. Stock v. Terrence, 11 N. Y. 2d 362, 229 N. Y. S. 2d 737, 183 N. E. 2d 752 .... 14, 15, 17, 18, 23

Phillips v. Commissioner, 283 U. S. 589, 596-597 27

Priest v. Las Vegas, 232 U. S. 604 22

Roller v. Holly, 176 U. S. 398 ..... 22, 23

Romero, Ex Parte, 51 N. M. 201, 181 P. 2d 811 29

Page

Saint Louis, B & M Ry. v. Taylor, 226 U. S. 200 3

Security Trust Co. v. Lexington, 203 U. S. 323, 333 23

Simon v. Craft, 182 U. S. 427 27

Sleeper, In re Appeal of, 147 Me. 302, 87 A. 2d 115 29

State ex rel. Fuller v. Mullinax, 364 Mo. 858, 269 S. W. 2d 72 ..... 20, 26, 29

Stuart v. Palmer, 74 N. Y. 183 23

Trust Co. v. Blodgett, 278 U. S. 509 3

United Fuel Gas Co. v. Hallanan, 257 U. S. 277 3

Wilson In re 126 S. E. 2nd 489 (not yet officially reported) 29

STATUTES AND CONSTITUTIONS CITED:

Constitution of the State of New York, Article 1, Sec. 6 12

Constitution of United States, Fourteenth Amendment 2, 12

Mental Hygiene Law of the State of New York, §74 and §76 ..... 4 through 10, 14, 15, 24, 29

U. S. Code, Vol. 28, §1257 (2) 3

ARTICLES CITED:

Curran, Hospitalization of the Mentally Ill, 31 North Carolina Law Review, 274, 280-281 (1951) 27

Freund, The Supreme Court and Civil Liberties, 4 Vand. Law Review, 533, 535-36 (1951) 27

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JURISDICTIONAL STATEMENT.

Appellant appeals from the remittitur order of the New York State Court of Appeals dated June 12, 1962, which affirmed the decisions of the Appellate Division, Fourth Department, Supreme Court, and two separate terms of the Special Term of the Supreme Court of the State of New York, which orders vacated two separate writs of habeas corpus and dismissed the petition upon which they were granted.

The said writs of habeas corpus raised the issues that:

(1) The appellant, Edward Stock, was being confined in the Rochester State Hospital without an effective or proper final order of commitment having been obtained and (2) if there were such a final order in effect his confinement was in violation of his constitutional rights under the Fourteenth Amendment to the Constitution of the United States, in that he was being confined and deprived of his liberty without due process of law and without having been given prompt notice that his liberty was to be taken from him, and without having been given the right to a prompt and fair hearing on the question of his mental illness and confinement.

Opinions Below.

The opinion of the New York State Court of Appeals is reported in 11 N. Y. 2d 362, 229 N. Y. S. 2d 737; N. E. 2d . The decision of the Appellate Division, Fourth Department, of the New York State Supreme Court is reported in 15 A. D. 2d 992, and the opinion of the New York State Supreme Court, Special Term is not officially reported. A copy of each opinion is made part of the record on appeal.

Jurisdiction.

The writs of habeas corpus were brought on by two separate petitions raising the question of the legality of the confinement of the appellant, Edward Stock, to the Rochester State Hospital for the mentally ill. The petitions questioned the constitutionality of Sections 74, subd. 7, and 76 of the Mental Hygiene Law of the State of New York.

The jurisdiction of the Supreme Court of the United States to hear this appeal rests upon 28 U. S. C. §1257 (2). In denying appellant's relief, the Courts of New York State have sustained the validity of Section 74, subd. 7 and Section 76 of the Mental Hygiene Law of the State of New York in the face of federal constitutional objections. The appellant can seek no further redress in the Courts of New York State because the matter has been finally determined by the highest court in that state. This is a "suit" within the jurisdictional meaning of the statute and such denial is a final judgment within the meaning of the statute.

The following decisions sustain the jurisdiction of the Supreme Court to review this matter on direct appeal: *Trust Co. v. Blodgett*, 278 U. S. 509; *Dahnke-Walker Co. v. Bondurant*, 257 U. S. 282; *Eureka Pipe Line Co. v. Hallanan*, 257 U. S. 265; *United Fuel Gas Co. v. Hallanan*, 257 U. S. 277; *Bandini Co. v. Superior Ct.*, 284 U. S. 8; *Bryant v. Zimmerman*, 278 U. S. 63; *Mt. Vernon Cotton Co. v. Alabama Power Co.*, 240 U. S. 30; *Detroit and MacKinac Ry. Co. v. Michigan Railroad Commission*, 240 U. S. 564; *St. Louis, B. & M Ry. v. Taylor*, 226 U. S. 200; *Davis v. Corbin*; 112 U. S. 36, 40; *McPherson v. Blacker*, 146 U. S. 1, 24; *American Express Co. v. Michigan*, 177 U. S. 404, 406.

Statutes Involved.

The statutes involved are Sections 74 and 76 of the Mental Hygiene Law of the State of New York. The full text of these sections is set out as follows:

§74. Admission on court certification.

1. A person alleged to be mentally ill, and who is not in confinement on a criminal charge, may be certified to and confined in any licensed private institution for the care and treatment of the mentally ill, upon an order made by a judge of a court of record of the city or county, or a justice of the supreme court of the judicial district in which the alleged mentally ill person resides or may be, upon a certificate made by two examining physicians, accompanied by a petition therefor, or upon such certificate and petition, and after a hearing, as provided in this section. In like manner any such person may be certified to the jurisdiction of the department and received and retained as a patient in an institution or facility in the department designated by the commissioner.

2. Any person with whom an alleged mentally ill person may reside or at whose house he may be, or the father or mother, husband or wife, brother or sister, or the child of any such person, or the nearest relative or friend available, or the committee of such person, or an officer of any well-recognized charitable institution or agency or home, or any public welfare officer of the town, any town or city service officer or commissioner of public welfare, or director of community mental health services, of the city or county in which any such person may be, may apply for an order certifying that the alleged mentally ill person is in need of care and treatment by presenting a petition containing a statement of the facts upon which the alleged mental illness is based, and because of which the application for the order is

made. Such petition shall be accompained by the certificate of the examining physicians, as prescribed in section seventy.

3. Except as hereinafter provided, notice of such application shall be served personally, at least one day before making such application, upon the person alleged to be mentally ill. Notwithstanding the foregoing provision, if the judge to whom application is made, be satisfied from any statement contained in the papers in the proceedings, or from inquiry, that personal service of the notice on the alleged mentally ill person would be ineffective or detrimental to such person, he may, in his discretion, dispense therewith, and he shall dispense therewith, if the examining physicians state in writing that personal service upon the alleged mentally ill person would, in their opinion, be detrimental to such person. However, whether such personal service on the alleged mentally ill person be dispensed with or not, and the petition be made by a person other than the wife, husband, father, mother, or nearest relative, such notice shall be served upon such wife, husband, father, mother or nearest relative of such alleged mentally ill person, if there be any such person known to be within the county; if not, upon the person with whom such person may reside, or at whose home he may be, or in their absence, upon a friend of such alleged person; and if there be no such person or persons, such service shall in writing be dispensed with.

4. When no application is made for a hearing on behalf of the alleged mentally ill person, the judge may, if satisfied that the alleged mentally ill person may require mental care and treatment, immediately issue an order directing that such person be admitted to the jurisdiction of the department to be received and retained as a patient in an institution or facility in the department designated by the commissioner, or to a licensed private institution for the care of the mentally ill, for a period of not exceeding sixty days, for the

purpose of observation and treatment of such person. If, however, it appears that such mentally ill person is harmless and his relatives or a committee of his person are willing and able properly to care for him, at some place other than an institution, then, upon their written consent, the judge may order that such person be placed in the care and custody of such relatives or such committee. Such judge may, in his discretion, require other proofs in addition to the petition and certificate of the examining physicians.

5. Upon the demand of any relative or near friend in behalf of such alleged mentally ill person, the judge shall, or he may upon his own motion, issue an order directing the hearing of such application before him, at a time not more than five days from the date of such order, which shall be served upon the parties interested in the application and upon such other persons as the judge, in his discretion, may name. Upon such day, or upon such other day to which the proceedings shall be regularly adjourned, he shall hear the testimony introduced by the parties and examine the alleged mentally ill person if deemed advisable, in or out of court, and render a decision in writing as to the need of such observation and treatment. If it be determined that such person is in need of observation and treatment, the judge shall forthwith issue his order directing the patient's admission to the jurisdiction of the department to be received and retained as a patient in an institution or facility in the department designated by the commissioner for the care and treatment of the mentally ill, or make such other order as is provided in this section. If such judge cannot hear the application he may, in his order directing the hearing, name some referee who shall hear the order certifying that the alleged mentally ill per-

son is in need of observation and treatment, he shall state in writing on the certificate, over his signature, his reasons for such refusal. The director of the state institution or facility in the department designated by the commissioner or the director or person in charge of the licensed private institution to which such person is certified shall be immediately furnished with the petition, the certificate of the examining physicians, the order directing a further hearing, so provided in this section, if one be issued, the report, decision or opinion of the judge or referee, and the order of certification, and upon receipt thereof he shall, at once, make provisions for the transfer and admission of such mentally ill person to such institution; or upon notice that the papers as designated above have been duly executed directing the care and treatment of a mentally ill person, the director may make provisions for the transfer and admission of such mentally ill person to the institution.

6. Copies of the petition, the certificate of the examining physicians, the order directing a further hearing, as provided in this section, if one be issued, the decision of the judge or the referee, and the order of certification of a patient to a licensed private institution shall be forwarded by the director or person in charge of such licensed private institution and filed in the office of the department and such copies shall be forwarded by the director or person in charge of a state or licensed private institution and filed in that office of the clerk of the county in which the mentally ill person resides. The judge, however, shall order all such papers so filed in the county clerk's office sealed, and exhibited only to the parties to the proceedings, or someone properly interested, upon order of the court. The relative or committee, to whose care and custody any mentally ill person is given under the terms of this section, shall forthwith file the petition, certificate and order in the office of the

clerk of the county where such order is made and procure and retain a certified copy.

7. At any time prior to the expiration of sixty days from the date of the order made as provided by this section, the director or the physician in charge or the medical officer designated by either of them, or the person in charge of the institution, to which the patient has been admitted for observation and treatment may, if he finds that such patient is in need of continued care and treatment, file in the office of the county clerk, a certificate setting forth his findings and the need for the continued care and treatment of such patient. Upon the filing of such certificate, the order theretofore made by the judge shall become a final order and such patient shall thereafter remain in such institution, or any other institution, to which he may be transferred, until his discharge in accordance with the provisions of this chapter.

8. The director or person in charge of any institution for the care and treatment of the mentally ill may refuse to receive any person upon any such order, if the papers required to be presented shall not comply with the provisions of this section, or if in his judgment, such person is not mentally ill within the meaning of this statute, or if received, such person may be discharged by the director or physician in charge. No person shall be admitted to any such institution under such order after the expiration of ten days from and inclusive of the date thereof. As amended L. 1952, c. 456; L. 1953, c. 582; L. 1954, c. 167, §1; L. 1955, c. 794, §5; L. 1959, c. 782, §4; L. 1960, c. 511, §4; L. 1961, c. 504, §6, eff. April 11, 1961.

§76. Review of proceedings and order of certification.

If a person certified to the jurisdiction of the department or an institution, pursuant to this chapter, or any relative or friend in his behalf, be dissatisfied with the final order of a judge or

justice certifying him, he may, within thirty days after the making of such order; obtain a rehearing and a review of the proceedings already had and of such certification, upon a petition to a justice of the supreme court other than the justice making such certification, who shall cause a jury to be summoned as in the case of proceedings for the appointment of a committee for mentally ill person where the question of fact arising upon the competency of the person is tried by a jury, and shall try the question of the mental illness of the person so certified in the same manner as provided in said proceedings. If such petition for rehearing and review be made by any other than the person so certified or the father, mother, husband, wife or child of such person or the person with whom the person certified was residing at the time of such certification or accustomed to reside, before such rehearing or review shall be had, the petitioner shall make a deposit or give a bond, to be approved by a justice of the supreme court, for the payment of the costs and expenses of such rehearing, review and determination of the question of mental illness by a jury as aforesaid, if the order of certification is sustained. If the verdict of the jury be that such person is sane, the justice shall forthwith discharge him, but if the verdict of the jury be that such person is mentally ill, the justice shall certify that fact and make an order of recertification as upon the original hearing. Such order shall be presented, at the time of the recertification of such mentally ill person, to, and filed with, the director or person in charge of the institution to which the mentally ill person is certified or to the institution or facility in the department designated by the commissioner to receive and retain such person as a patient, and a copy thereof shall be forwarded to the department by such director or person in charge and filed in the office thereof. Proceedings under the order shall not be stayed pending an appeal therefrom, except upon an order of a justice of the

supreme court, and made upon a notice and after a hearing, with provisions made therein for such temporary care or confinemnt of the alleged mentally ill person as may be deemed necessary. If a judge or justice shall refuse to grant an application for an order of certification of a mentally ill person proved to be dangerous to himself or others, if at large, he shall state his reasons for such refusal in writing, and any person aggrieved thereby may obtain a rehearing and review and the determination of the question of mental illness by a jury in the same manner and under like conditions as from an order of certification. As amended L. 1961, c. 504, §8, eff. April 11, 1961.

Questions Presented.

1. Does the statute, as construed by the Court of Appeals, satisfy the constitutional requirement of due process before depriving a person of his liberty, when there is neither a requirement, nor time limitation within which to serve personal notice that a final order depriving a person of his liberty is about to be made or has been made?

2. Further, does such a final order satisfy due process when the person committed thereunder has neither received notice of the order nor is it required that he receive such notice?

3. Further, is there a right to a prompt, complete and fair hearing upon the question of the right to confine the person, as required by due process, when the statute neither prescribes a time within which notice must be given antecedent to a hearing, nor requires that such notice ever be given?

Statement of Case.

On June 12, 1959, the appellant-relator was committed to the Buffalo State Hospital, Buffalo, Erie County, New York, under Section 74 of the Mental Hygiene Law of the State of New York, for a period of sixty (60) days for purposes of observation and treatment. This order was filed in the Monroe County Clerk's office.

The order stated that if within the sixty days a certificate is filed in the county clerk's office by a duly designated medical officer of the Buffalo State Hospital, stating that the alleged mentally ill person is in need of continued care and confinement; then the temporary sixty-day order shall become final (see subdivision 7 of Section 74 of the Mental Hygiene Law.)

Such a certificate was filed in the Monroe County Clerk's office on June 28, 1959. The order was signed by Dr. Henry H. Haines, supposedly a duly designated medical officer of the Buffalo State Hospital.

At some date thereafter the appellant-relator was transferred to the Rochester State Hospital where he continues to be confined. He has been so confined for over three (3) years since the filing of the subdivision 7 certificate.

No notice of the existence of the certificate, set forth in the record on appeal herein, has ever been served upon appellant-relator, nor upon anyone on his behalf. There has been no notice that such certificate was filed nor as to the contents thereof. Neither has the appellant-relator, nor anyone on his behalf, been given actual notice that he is confined for an indeterminate period of time, nor of the grounds upon which he is being held.

On the 31st day of May, 1961, a writ of habeas corpus was granted upon the petition of appellant-relator. This

petition raised the issue that there was no final order in effect with reference to the appellant-relator. Arguments were heard at Special Term, Supreme Court, Monroe County, on June 8, 1961, Honorable Clarence H. Brisco, Justice presiding.

It was the contention of the appellant-relator that since he has had no notice of indefiite confinement and no hearing thereon, there could be no final order effective against him, and since the sixty-day temporary order had expired he should be released from the custody of the respondent. Appellant-relator had been confined, at this period of time, for almost two years. (Now over three [3] years.)

Appellant-relator's petition and writ of habeas corpus were quashed by order of said Honorable Clarence H. Brisco, based upon his decision dated July 12, 1961. The order quashing the same was dated September 28, 1961.

By such decision and order the Court below held in effect that there was a final order and that appellant-relator was not being held illegally.

Thereafter, and on the 17th day of July, 1961, another writ of habeas corpus was allowed based upon a second petition of appellant-relator. This petition raised the constitutional issue that if there was a final order of commitment without any notice having been served upon appellant-relator allowing him a hearing to controvert *ab initio* the basis of the final order, he was being deprived of his rights to due process under the Fourteenth Amendment to the United States Constitution and Article I, Section 6, of the New York State Constitution.

Argument was had thereon at Special Term, Supreme Court, Monroe County, Honorable Domenick L. Gabrielli, Justice presiding.

The lower Court, by decision of Domenick L. Gabrielli, Justice of the Supreme Court, dated September 8, 1961, and order by the same Justice on September 26, 1961, dismissed the petition of appellant-relator and vacated the writ of habeas corpus.

By so doing the Court has held that lack of actual notice, as required by subdivision 7 of Section 74 and Section 76 of the Mental Hygiene Law, as interpreted by *In re of Coates*, 9 N. Y. 2d 242, 213 N. Y. S. 2d 74, for over two years was not a deprivation of the appellant-relator's constitutional rights. It has held that lack of such notice for over two years is not unreasonable.

The Appellate Division, Fourth Department, has affirmed these orders without opinion.

The Court of Appeals has affirmed these orders upon a written opinion of Chief Judge Charles A. Desmond, which opinion did again hold that Mr. Stock was legally confined even though he has never had notice of the final order confining him to the State Hospital.

Two issues are therefore raised:

1. Whether or not appellant-relator's constitutional right to due process has been violated because of the failure of the respondent to give appellant-relator prompt notice and a prompt and complete hearing *ab initio* as to the issues upon which he is being held.

2. Whether or not there was final order in effect against the appellant-relator. If there was no such final order he should be released because it is unconstitutional to hold a person without a final binding order.

There is Presented a Substantial Federal Question.

As a result of two recent decisions of the Court of Appeals of the State of New York, the constitutional guarantee, under the Fourteenth Amendment to the Constitution of the United States, of "due process" to involuntary inmates of the New York State Hospitals for the mentally ill is in an acute state of confusion and in danger of becoming moribund.

The two recent cases in question are:

In re Coates, 9 N. Y. 2d 242, 213 N. Y. S. 2d 74, 173 N. E. 2d 797, appeal dismissed *sub. nom.; Coates v. Walters*, 368 U. S. 34, and the cause of action on appeal to this court, *People ex rel. Stock v. Terrence*, 11 N. Y. 2d 362, 229 N. Y. S. 2d 737, N. E. 2d .

In these cases Section 74, subdivision 7, and Section 76 of the Mental Hygiene Law of the State of New York have been interpreted and construed. As a result of these interpretations the involuntary commitment procedures to the New York State Hospitals for the mentally ill are as follows:

a) A temporary order, based upon petition and the affidavits of two physicians, confines a person to a State Hospital for a sixty day period of observation and care (Mental Hygiene Law §74 [1] through [5]).

b) Within that sixty days, by virtue of both the statute and the temporary commitment order, a certificate making findings, for the first time, of mental illness and need of continued care and confinement may be filed in the office of the Clerk of the County of residence, by a duly designated medical officer of the State Hospital (Mental Hygiene Law §74 [7]). These records are

sealed and may not be examined except by special Court order (Mental Hygiene Law §74 [6]).

(In the case at bar the attorneys for Mr. Stock had to obtain a Court order so that they could determine under what statute Mr. Stock was confined and further to determine whether a certificate making findings of mental illness and need of confinement had been filed. Mr. Stock's mother initially contacted the attorneys at a time almost two years after the certificate had been filed. Up to this time, she thought he was "under arrest".)

The filing of this certificate makes the order "final" and the confinement period indefinite.

c) The person so deprived of his liberty is entitled to a jury trial, if dissatisfied with the final order, within thirty days after making such an order (Mental Hygiene Law §76). No requirement of notice with reference to this certificate or "final" commitment is set forth in the statutes.

d) By decision (*In re Coates, supra*), in order to save the constitutionality of the procedure set forth in (a) through (c), above, the New York State Court of Appeals has required that actual personal service of notice of the certificate and confinement be given to the person so confined before the thirty day period of limitation for trial may start to run under Section 76 of the Mental Hygiene Law. That Court also held that the continued confinement under §74 (7) of the Mental Hygiene Law is constitutional "so long as the patient has the right to a prompt and complete hearing *ab initio*" (*In re Coates, supra*, p. 254).

e) By further decision, and in this action (*People ex rel. Stock v. Terrence, supra*), the Court of Appeals has held that the "actual personal service of notice" does

not even have to be given, and its only purpose is to preserve the patients' thirty day period of limitation to commence a proceeding. It further held "that the absence of such notice had no effect on the validity of the relator's continued detention after and by reason of the medical director's official certificate" (p. 366). No mention was made in the Stock decision of the appellant's rights to a "prompt and complete hearing *ab initio*" (*In re Coates, supra*, p. 254).

Therefore, a person in New York State may now be indefinitely confined and declared to be mentally ill upon a certificate of a medical officer of the State Hospital without notice ever having been given to that person of the basis for his confinement and of his rights to a prompt hearing or jury trial.

His confinement is sought to be justified because he has a right to a discretionary notice (which need never be given) which preserves a meaningless right to a hearing which has no reality or worth without notice in the first instance having been given. This hearing is supposedly *ab initio*, prompt and complete and touches upon the questions of his mental illness and confinement (*In re Coates, supra*, p. 254). Such a hearing cannot in any way be prompt unless the notice which leads to it is likewise prompt. Since the notice does not have to be served at all it cannot be said to be prompt or reasonable. In fact, it is not notice at all under the classic requirements of "due process."

To say that the whole matter of commitment procedure under Sections 74 and 76 is in a state of confusion is an understatement. The law as presently construed violates the traditional concept of due process.

In the case of *In re Coates*, the Court held two propositions, both of which are required to protect a person's

rights to due process before his liberty may be deprived. First they held that "actual personal service of notice" of the filing of the certificate is required to protect the constitutional rights of the patient. Secondly, they held that the person involved must have a "right to a prompt and complete hearing or review of the determination (made through the subdivision 7 certificate) *ab initio*" (p. 254).

Under this construction of the statute, it could be said that since notice was required and since a prompt hearing was required it could be implied that the Court required prompt notice leading to the prompt hearing that was set forth. Earlier in the *Coates* opinion the Court, at page 250, held that a prompt hearing after the finality of the order became a fact, satisfied "due process." (Without accepting this argument, we will assume it to be true for purposes of the present argument and cover this point further on.) Therefore, in light of the *Coates* decision it could be argued that since the person involved had a right to notice and a prompt hearing, albeit after the fact of a final order, his constitutional rights were protected.

Then, the decision in the case at bar was made. Through this decision the Court of Appeals has separated the prompt hearing from the notice and has given the State Hospital the power to make a final order depriving a person of his liberty without the necessity of giving that person notice that there is something he can do to attempt to effect his release.

The Court said in *People ex rel. Stock v. Terrence* at page 366 that as a result of filing the subdivision 7, Section 74, certificate, "the order which in first effect sent him to the mental hospital for a sixty day (or less) period of observation and treatment had become final in the sense that it required he remain in the hospital

for an indefinite time * * *." Then they go on to hold "that (the) absence of such notice had no effect on the validity, already established by the County Court order of relator's continued detention after and by reason of the medical director's official certificate."

Finally, they hold that the notice of the temporary 60-day order was enough to warn of the possible filing of a certificate and of the order becoming final.

There is an anomalous situation indicated immediately, when compared to "due process," by the two opinions. The New York Court now holds that a commitment order may become final and may confine a person indefinitely without that person ever having been given notice that there is a proceeding available to him to seek his release.

It is further held in *Stock* that if the person wishes to commence a proceeding on his own he may do so. It must be remembered the Mr. Stock was confined in Erie County and the certificate was filed in Monroe County, which is 80 miles east of Erie County. More important, it must be remembered that the certificate is sealed in the County Clerk's office. It is difficult for a person who is free to obtain access to such records; when the individual is confined, it becomes virtually impossible.

In *Coates*, at page 252, the Court held in this situation "(T)o imply * * * notice from the mere provisions of the statute by virtue of the presumption that the confined person knows the law is * * * highly unrealistic. Moreover, we believe that such implied or constructive 'notice' falls short of even the 'mere gesture' which was held insufficient in the *Mullane* case * * *." See *Mullane v. Central Hanover & Trust Co.*, 339 U. S. 306, 70 S. Ct. 652, 94 L. Ed. 865. Now, under the *Stock* ruling, the Court says that Mr. Stock *should know* the law and *should be*

aware of the filing of the certificate and may commence his own proceeding seeking his release. An enigma then is created in that we do not know whether or not a person is supposed to know of the filing of the certificate, or even whether he is supposed to know that a certificate may be filed within the 60-day period.

This, of course, is the very reason "due process" requires notice. As was held in *Mullane v. Central Hanover Trust Co.* (*supra* at p. 314), "(T)his right *to be heard has little reality or worth unless one is informed that the matter is pending* and can choose for himself whether to appear or default, acquiesce or contest." (Italics added.) In *Coates* the Court justified the reading of notice into the statute on the basis of its earlier decision in *People ex rel. Morriale v. Branham*, 291 N. Y. 312, 52 N. E. 2d 881. In that case the Court read into the statute the requirement of notice *before* a person may be confined as a mental deficient. They further held that since the relator had not been served such notice he was being illegally confined.

There is no question that such a construction saves the constitutionality of the statute in question. However, the Court of Appeals has not similarly construed Section 74 and Section 76 of the Mental Hygiene Law. They have in effect read notice into a statute from the *Morriale* case but have left out the most important thing, to wit, the requirement that notice be given at least within a reasonable time after the fact of final commitment.

By its decision in *Stock* the Court of Appeals has, it is submitted, put itself in the untenable position of holding the notice required in *Coates* does not have to be prompt, and does not, in fact, ever have to be given. Confusion becomes compounded when it holds that the person's rights are protected because he may commence

a proceeding on his own to seek his release. This implies knowledge of the filing of the certificate and knowledge of the reasons for his detention, and further knowledge that there is something he may do to seek his release. As was held in *In re Coates*, this is unrealistic.

In the case of *State ex rel. Fuller v. Mullinax*, 364 Mo. 858, 269 S. W. 2d 72, involved a Missouri statute which stated that a patient hospitalized as a mental patient without having been given notice or a hearing may request in writing to be released. This, then, gives rise to a proceeding on the question of mental illness. Further, the statute says the head of the hospital shall provide reasonable means for informing involuntary patients of their right to release as set forth above. In holding these statutes unconstitutional the Missouri Court reached and decided the question presented in the case at bar by the *Coates* and *Stock* opinion. The Missouri Court held that indeterminate confinement would result from the requirement of subsequent action on the part of the patient, and that "for the statute in operation to thus deprive a person of his liberty without any opportunity to be heard * * * would constitute a denial of due process, and accordingly render the statute * * * unconstitutional."

The commitment of mental patients in New York State is in no way different from that in this Missouri case. Under the New York statute, as presently interpreted, the patient is confined for an indeterminate period through an "*ex parte*" final order and he may seek redress only by his own action or someone on his behalf. Further, notice of his right to redress may be given to him if the hospital official wishes to do so. If it is determined by the hospital officials that notice should be given it may be given at some obscure time in the future.

It is incumbent upon the patient to bring a proceeding to protect his constitutional rights which should, under

the Fourteenth Amendment to the Federal Constitution, be guaranteed him by the law which seeks to deprive him of his liberty.

Unless notice and hearing is prompt, it becomes impossible to marshal facts and evidence to controvert findings *ab initio*. The purpose of the hearing is to prove mental illness or lack thereof from the date of confinement. This becomes impossible, as a practical trial matter, unless there is prompt notice and hearing. A right to a hearing upon a writ of habeas corpus as to mental illness does not satisfy the requirement that the hearing be in the proceeding leading to the confinement and such a hearing could raise the issue of mental illness only at the date of the habeas corpus, not *ab initio*.

Such notice may, of course, be served by the hospital official promptly after the filing of the certificate, *if he chooses*. Such a holding places the patient's right to "due process" in the sole discretion of the hospital officials. The hospital officials obtain the desired result of indefinite confinement in an "*ex parte*" manner and this can be contested only upon affirmative action by the patient who has an abstract right to hearing without ever having been informed either of his rights or of the grounds for confinement.

Such a right is not only less than "due process," but in fact is process at the discretion of another. In *Mullane v. Central Hanover Trust Co.*, 339 U. S. 306, 315, it was held that notice which is a mere gesture is not due process. A mere gesture at least implies that the gesture must be made. In this action not only is the requirement of notice less than a gesture, but is one which does not ever have to be exercised.

Due process is equivalent to the right to be heard. "(T)his right to be heard has little reality or worth

unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." (*Mullane v. Central Hanover Trust Co., supra*, p. 314; see also *Grannis v. Ordean*, 234 U. S. 358, 394.) The notice must be reasonably calculated to *apprise* the parties *of the pendency of an action.* See *Mullane v. Central Hanover Trust Co.* (*supra*), page 314; cf. *Milliken v. Meyer*, 311 U. S. 457; *Grannis v. Ordean* (*supra*); *Priest v. Las Vegas*, 232 U. S. 604; *Roller v. Holly*, 176 U. S. 398. In the action at bar the action is not only pending but has reached a final order and confinement for over three (3) years and still there is no reasonable notice required. That at the very least, reasonable notice is a person's due, cannot be questioned. See *Dohany v. Rogers*, 281 U. S. 326; *Hurwitz v. North*, 371 U. S. 40; *American Land Co. v. Zeiss*, 219 U. S. 47.

The case of *Coe v. Armour Fertilizer Works*, 237 U. S. 413, sets forth clearly why appellant feels his rights to "due process" have been denied him.

This Court in that case held at page 424 as follows:

> "Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires."

And further, at page 425:

> "The writ of execution cannot of itself be treated as equivalent to a writ of attachment, establishing a lien upon the stockholder's property, but going no further until he has had an opportunity to show cause why that property should not be applied to the payment of the corporation's debt. Not only is such a purpose wholly unexpressed in the writ, but such is not its normal function or effect, no 'day in court' is named, and there is no provision for notice or monition by service, publication, mailing, or otherwise. *Windsor v.*

McVeigh, 93 U. S. 274, 279, *et seq.*; *Grannis v. Ordean*, 234 U. S. 385, 393."

In *Security Trust Co. v. Lexington*, 203 U. S. 323, 333, this Court held:

> "If the statute did not provide for a notice in any form, it is not material that as a matter of grace or favor, notice may have been given of the proposed assessment. It is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case that is material, but the question is, whether any notice is provided for by the statute. *Stuart v. Palmer*, 74 N. Y. 183."

In both cases the holding of *Stuart v. Palmer*, 74 N. Y. 183, was cited as controlling law. As was held in that case at page 188:

> "It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them and give them the right to a hearing and an opportunity to be heard. It matters not * * * that the assessment has, in fact, been fairly apportioned. The constitutional validity of law is to be tested, not by what has been done under it, but by what may, by its authority, be done."

Certainly, notice and hearing within the discretion of hospital officials does not meet the minimal requirements of "due process." In so holding in the *Stock* opinion, the Court of Appeals has done away with "due process"; as required in the leading case of *Stuart v. Palmer* (*supra*).

In *Roller v. Holly*, 176 U. S. 398, 409, this Court stated:

> "The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion."

And in *Central of Georgia Ry. v. Wright*, 207 U. S. 127, 138, this Court declared:

> "Notice must be provided as an essential part of the statutory provision and not awarded as a mere matter of favor or grace."

The notice referred to by Chief Judge Desmond in the *Stock* opinion applies only to the obtaining of the temporary 60-day order. The Court of Appeals could have held in *Coates* that this notice leading to the temporary order was sufficient. However, it did not; it instead went to great lengths to provide "actual personal service of notice" after the filing of the certificate under subdivision 7. This was necessary and proper because subdivision 7 was a separate and distinct proceeding from the application for a temporary order and must, by necessity, be based upon facts and circumstances not in existence when the temporary 60-day order was obtained.

Subdivision 7 is in no way supplemental to the subdivisions referring to the notice required in the temporary restraining order as set forth in subdivisions 1-5 of Section 74. They are separate and distinct proceedings.

Section 74, subdivision 1, of the Mental Hygiene Law generally states the purpose of Section 74. This subdivision confers jurisdiction upon certain courts and judges to hear matters therein and sets up the requirements as to the petitions (applications) and the statements necessary to commence the temporary commitment procedure.

Subdivision 2 sets forth what persons may make the necessary petition and/or application.

Subdivision 3 sets forth the requirement of notice of the application to the alleged mentally ill person and the procedure whereby it may be dispensed with.

Subdivision 4 provides that where no hearing is requested (as provided for in subdivision 5), the judge may issue an order based on the application to restrain the person for a period not exceeding 60 days for observation and treatment.

Subdivision 5 refers to the right of a hearing upon the application and the issuance of an order, upon the determination of the hearer of fact, *that the person is in need of observation.* Also provided by this subdivision is the right to appoint a referee to determine these questions.

Therefore, it cannot be said that the provision for notice, as set forth in subdivision 3, has any application to subdivision 7. Subdivision 3 notice applies only to the application for a temporary order for purposes of observation. It does not apply in any way to the obtaining of the final order which leads to indefinite confinement.

Subdivision 3 states: "* * * notice of such application shall be served personally * * *." The application referred to in that statement must be limited to that set forth in subdivisions 1-5 because there is no reference, actual or implied, to an application of any type under subdivision 7. Subdivision 7 calls only for findings, certification and a final order.

The final order in subdivision 7 is based *upon findings and determinations non-existent at the time of temporary order.* Obviously, there is no opportunity for the patient to dispute the findings in the subdivision 7 certificate (or to even know what they will be) at the time of the temporary order. The determinations and findings which lead to the final order are unrelated to the provisions of subdivisions 1-5. The only connection between subdivision 7 and subdivisions 1-5 is that the order provided for in subdivisions 1-5 happens to become the final order.

under subdivision 7. The proceeding set forth in subdivision 7 is, therefore, separate and distinct from that set up under subdivisions 1-5 in that they obtain different results. The Court of Appeals said as much, by implication, in *Coates* when they required "actual personal service of notice" in the subdivision 7 proceeding.

Accordingly, we have a law which provides for a final order determining the mental condition of a person and placing that person under indefinite or permanent confinement, and when read in conjunction with another section of the said law, provides for a hearing by a jury after the order has become final, based only upon application by the party aggrieved, unless notice is served by chance or discretion by the hospital, as to that person's mental condition. All of this without required actual or implied notice of any type to anyone. It is in effect nothing more than a final commitment order obtained "*ex parte*." To make matters worse, it is a final order of confinement made by a non-judicial officer, to wit: a duly designated official of the State Hospital. Since the findings and determinations under subdivision 7 are original they should be judicially decided at the very least.

We would like to point out that further constitutional questions are presented in allowing a hearing after the fact of final commitment. In the case of *State ex rel. Fuller v. Mullinax* (*supra*), the Court held that such a procedure, in the case of a person deprived of his liberty, is unconstitutional.

The Court of Appeals in *Coates* at pages 250 and 251 condoned such a procedure as constitutional by analogizing the commitment procedures in New York State to a line of Supreme Court cases allowing seizure of property without prior judicial hearing so long as a subsequent hearing is afforded.

We believe such analogy is unwarranted. When property is confiscated, the owner remains at liberty and is free to assert his rights, while a confined person is at a severe disadvantage and is unable to effectively challenge the validity of a commitment and confinement after the fact of final confinement. (Cf. *Phillips v. Commissioner*, 283 U. S. 589, 596-597.) The far better construction in protecting a person's right to life and liberty is that the hearing must be allowed at a time before the person is deprived of his life or liberty. The requirement in the case of deprivation of a person's life is obvious.

We have discovered no Supreme Court decision which supports the Court of Appeals decision in *Coates* on the matter of a hearing after confinement. See *Freund*, The Supreme Court and Civil Liberties, 4 Vand. Law Review, 533, 535-36 (1951); *Curran*, Hospitalization of the Mentally Ill, 31 North Carolina Law Review, 274, 280-281 (1951); cf. *Simon v. Craft*, 182 U. S. 427. Even if such a hearing may be held subsequent to the final order, it is inconceivable that such subsequent notice and hearing should not be required within a reasonable time after the final order becomes effective. Certainly, a statute which sentences a person on a criminal charge, and thereafter allows the person a trial on the matter of his guilt or innocence would be unconstitutional. Is not the situation the same in this case?

The Court of Appeals has held in an earlier case that such a procedure is not proper. In *People ex rel. Morriale v. Brantham* (*supra*) at page 318 the Court held that "(I)nquiry as to the fact of mental defectiveness should precede such an order if the order is based upon a finding that the prisoner is a mental defective. An

inquiry held thereafter in proceedings brought by an inmate seeking delivery from custody can hardly supply a sufficient basis for a decision already made."

Now the Court has done a complete turnabout, and has held that a subsequent proceeding is proper. We contend that the holding in *People ex rel. Morriale v. Branham* is proper, and the holding in *Coates* and *Stock* violate "due process."

Next, the question as to whether this is an isolated case of denial of "due process" without much harm resulting therefrom?

If one person is denied his liberty without due process of law for any period of time, then such a violation offends the rights of all persons similarly situated, whether or not they have actually been deprived of their liberty.

It is not known how many persons have been committed to state hospitals in the State of New York under these statutes. Except for convicted criminal commitments to mental institutions, every other involuntary commitment to the New York State Hospitals, and, in fact, private institution, we have heard of, come under Sections 74 and 76 of the Mental Hygiene Law of the State of New York. We cannot say there have not been other commitments under other sections of the laws of the State of New York, but we can simply say we have never heard of any such commitments, except in criminal actions. This may be controverted by our adversaries, but we would venture a guess that over 50 per cent of the persons in the state hospitals of the State of New York are there under the provisions of Section 74 of the Mental Hygiene Law. Further, we

are sure, and this again may be controverted, that none of these persons has ever been served with notice of the filing of the certificate in subdivision 7, Section 74, of the Mental Hygiene Law. Even if this latter is not true, we are sure a substantial percentage of those persons involved have never been given notice.

The number of persons so situated is also unknown to us. However, if denial of one person's liberty without due process of law is an evil to be avoided, the denial of such rights to more than one person should be prohibited.

The same type of statute and procedure has been under attack in the Supreme Court of North Carolina in the case of *In re Wilson*, 126 S. E. 2nd 489 (not yet officially reported); in New Mexico, *Ex Parte Romero*, 51 N. M. 201, 181 P. 2d 811; in Missouri, *State ex rel. Fuller v. Mullinex*, 364 Mo. 858, 296 S. W. 2d 72; in Vermont, *In re Cornell*, 111 Vt. 525, 18 A. 2d 304, in Maine, *In re Appeal of Sleeper*, 147 Me. 302, 87 A. 2d 115. In all of these cases the statutes, which were very similar to the New York Statutes, were declared unconstitutional. Therefore, the question is substantial, not only in New York State but elsewhere in the United States, and does require clarification by the United States Supreme Court. The question presented is how can these statutes be unconstitutional and the New York Statute be legal?

Mr. Stock continues to languish in the State Hospital three years after the subdivision 7 certificate was filed. He has never received notice of the basis of his confinement nor that he may avail himself of a proceeding to seek his release. Such a notice at this late date could hardly afford him a right to a "prompt and complete hearing, *ab initio*." Such a deprivation of a person's constitutional rights should not be allowed to stand.

In effect, the Court of Appeals has held that Mr. Stock may continue to be confined without any right to notice, and with a hypothetical right to a hearing or a trial, only if he initiates the proceeding himself.

Respectfully submitted,

WHITBECK & HOLLORAN,
by VITO J. CASSAR
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APPENDIX TO JURISDICTIONAL STATEMENT.

Index to Appendix.

	Page
Notice of Appeal to the Supreme Court of the United States	34
Decision of Brisco, J.	36
Decision of Gabrielli, J.	38
Opinion	41
Remittitur	45

Notice of Appeal to the Supreme Court of the United States.

COURT OF APPEALS,

STATE OF NEW YORK.

PEOPLE *ex rel.* EDWARD STOCK,

Plaintiff-Appellant,

vs.

CHRISTOPHER F. TERRENCE, M. D., Director, Rochester State Hospital,

Defendant-Respondent.

Action No. 1.

PEOPLE *ex rel.* EDWARD STOCK,

Plaintiff-Appellant,

vs.

CHRISTOPHER F. TERRENCE, M. D., Director, Rochester State Hospital,

Defendant-Respondent.

Action No. 2.

Notice of Appeal to the Supreme Court of the United States:

1. Notice is hereby given that Edward Stock, the appellant above-named acting on behalf of the People of the State of N. Y. *ex relatione*, hereby appeals to the Supreme Court of the United States of America from

the final orders of the Court of Appeals of the State of N. Y., which orders affirmed the orders of the Appellate Division, Fourth Dept. and N. Y. State Supreme Court, Special Term, Monroe County dismissing two of appellants' petitions for Writs of Habeas Corpus which sought the release of appellant from the custody and control of the respondent herein upon the grounds that appellant was being deprived of his liberty under statutes (§74 [7] and §76 of the Mental Hygiene Law of the State of N. Y.) which are violative of the constitutional provisions of the Fourteenth Amendment of the Constitution of the U. S. A.

This appeal is taken pursuant to 28 U. S. C. §1257 (2).

II. The clerk of the court will please prepare a certified transcript of the record in this cause for transmission to the clerk of the Supreme Court of the U. S. A., and include in said transcript the following:

1. Notice of Appeal to the Supreme Court of the U. S. A.
2. Orders appealed from.
3. Opinions:
   a) Clarence J. Brisco, J. S. C., July 12, 1961.
   b) Domenick L. Gabrielli, J. S. C., Sept. 8, 1961.
   c) N. Y. S. Court of Appeals by Desmond, C. J., June 12, 1962.
4. Petitions of Edward Stock verified May 31, 1961 and July 17, 1961.
5. Petition of John Benny M. D. dated June 9, 1959.
6. Medical Certificates by Jeanette Ettinger M. D. and Alfred L. C. Ulrich M. D. dated June 6, 1959.
7. Certificate of Judge Burke J. Burke relating to Personal Service dated June 12, 1959; notice signed by Louis L. Scott and affidavit of Service by Louis L. Scott dated June 9, 1959.

8. Order of Certification by Judge Burke *J.* Burke dated June 12, 1959.

9. Certificate of Henry R. Haines, Filed July 29, 1962.

10. Remittitur from Court of Appeals entered thereon.

III. Under the provisions of §74 (7) and §76 of the M. H. L. of the State of N. Y., as interpreted by the Court of Appeals, a person may be confined in a State Hospital under a temporary court order for purposes of observation for a temporary 60 day period.

During that sixty day period the officials of the State Hospital may file a certificate finding the person to be mentally ill and in need of continued care and confinement.

All of these papers are filed and sealed in the County Clerks office and can be shown only upon a court order allowing such inspection of M. H. L.

§74 (7) says further, that upon the filing of the said certificate the order of confinement becomes final.

§76 of the M. H. L. then says the patient has thirty days after the order becomes final to seek a jury trial on the question of his mental illness and need of confinement. No requirement of notice is set forth therein.

The Court of Appeals in construing and interpreting these statutes have held that the order does in fact become final upon the filing of the said certificate. Also they have read into the statute the requirement of actual personal service of a notice upon the patient of the filing of the certificate. Further they held that the thirty days for a hearing *ab initio* prompt and complete hearing *ab initio* does not commence to run until after such notice. In addition they have decided that such notice does not have to be given and if it is not given the confinement and final order continues to be valid and the indefinite period of incarceration of the patient continues to be proper.

The effect of the statute as so construed is to allow a final order, depriving a person of his liberty, without the court guarantee of prompt notice leading to a

prompt, full and fair hearing *ab initio* having been given. The court by reading into the statute the requirement of notice has not provided the protection necessary to satisfy the constitutional requirement of "due process" but has only provided for notice in the abstract, which notice tends to keep alive a right to a hearing which has little reality or worth without the proper notice having been given within a reasonable amount of time. The Court of Appeals has required notice, but has further left the giving of such notice in the discretion of the Director of the State Hospital, who then determines whether or not to give notice. If he decides not to give such notice it makes no difference to the directors because the patient is confined for an indefinite period by virtue of the filing of the certificate. Such is what has happened to the appellant herein.

The question then presented by this appeal is:

Does the Mental Hygiene Law of the State of N. Y., §74 (7) and §76, as interpreted and construed, violate the appellants' right to due process of law under the 14th amendment of the Constitution of the U. S. by depriving such persons a reasonable and prompt notice and a reasonable and prompt hearing before he is deprived of his liberty.

Dated: Rochester, New York, May 22, 1961.

Yours, etc.,

WHITBECK & HOLLORAN
By VITO J. CASSAN
Attorneys for the Appellant
Office and P. O. Address
45 Exchange Street
Rochester 14, New York

To:

Raymond J. Cannon, Clerk
Court of Appeals
Court of Appeals Hall
Albany, New York

Louis J. Lefkowitz, Esq.
Attorney General, State of New York
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A. Gould Hatch, Monroe County Clerk
Monroe County Courthouse
Rochester 14, New York

Decision of Brisco, J.

STATE OF NEW YORK, SUPREME COURT,

COUNTY OF MONROE.

PEOPLE *ex rel.* EDWARD STOCK,

Plaintiff-Appellant,

vs.

CHRISTOPHER F. TERRENCE, M. D., Director, Rochester State Hospital,

Defendant-Respondent.

Petition For a Writ of Habeas Corpus.

Whitbeck & Holloran, Attorneys for Petitioner.

Louis J. Lefkowitz, Attorney General of the State of New York, Attorney for Respondent, in Opposition, by Paul T. Rubery, Assistant Attorney General.

Memorandum.

BRISCO, J.:

In the exercise of discretion the application is denied without prejudice on the grounds that there has been no violation of the relator's constitutional rights. The petitioner has failed to show that his imprisonment is illegal. On the other hand, the petitioner's temporary confinement without actual personal notice to him is valid. In the *Matter of Coates*, 9 N. Y. 2d 242, 254, 213 N.

Y. S. 2d 74, 84. The petitioner's application and the Writ of Habeas Corpus, which is based on said petition, is quashed and the petitioner shall be continued in the control of the Director of the Rochester State Hospital until the further order of the Court.

Submit order accordingly.

Dated: July 12, 1961

CLARENCE H. BRISCO,
Justice, Supreme Court

Decision of Gabrielli, J.

STATE OF NEW YORK, SUPREME COURT,

COUNTY OF MONROE.

PEOPLE *ex rel.* EDWARD STOCK,

Plaintiff-Appellant,

vs.

CHRISTOPHER F. TERRENCE, M. D., Director, Rochester State Hospital,

Defendant-Respondent.

Petition For a Writ of Habeas Corpus.

Appearances:

Whitbeck and Holloran, Esqs., attorneys for petitioner.

Louis J. Lefkowitz, Attorney General of the State of New York, Paul T. Rubery, Esq., Assistant Attorney General, for the defendant.

Memorandum—Decision.

GABRIELLI, J.:

The petitioner herein was on June 12, 1959, committed to the Buffalo State Hospital at Buffalo, New York, by certification of an Erie County Judge, pursuant to Section 74 of the Mental Hygiene Law, for a period of 60 days for observation and treatment. On July 26, 1959, and before the expiration of the 60-day period, a certificate

was duly made by the Medical Officer of the State Hospital that the petitioner was mentally ill and was in need of continued care and treatment; and he was thereafter transferred to Rochester State Hospital, he being a resident of Monroe County.

At the time the first above mentioned order was made, notice was served upon the petitioner and his mother.

The petitioner herein claims that his constitutional rights have been violated and invaded, and that his detention in the Rochester State Hospital is illegal on the ground that notice of the filing of the certificate at the expiration of the 60-day period was not given to him.

It further appears that this petitioner has made a similar application before Hon. Clarence H. Brisco, and by decision dated July 12, 1961, that petition was dismissed.

It appears that the present application is based substantially on the same grounds as put forward in the previous application.

The Attorney General has requested a dismissal of the proceeding, pursuant to the provisions of Section 1234 of the Civil Practice Act, which provides, in part, as follows: "For failure to comply with the provisions of this section or to state any new facts other than were stated in the previous application, the writ made on such subsequent application may be vacated without notice or the application may be denied * * *."

Nowhere in the moving papers is there any claim that the petitioner is mentally sound and/or is not mentally ill. The petitioner has not based his application on a claim that he is legally detained because he is actually not committable from a mental standpoint. That matter is not before the Court at this time. The petitioner has the right to test that at any time under Section 204 of the Mental Hygiene Law, which, in part, provides "Anyone in custody as a mentally ill person, * * *, is entitled to a Writ of Habeas Corpus, upon a proper application made by him or some relative or friend in his behalf. Upon

the return of such writ, the fact of his mental illness, * * * shall be inquired into and determined * * *."

The petitioner has failed to show that his detention is illegal, and as a matter of fact, the moving papers and photostatic copy of the commitment show that his confinement is valid. (*Matter of Coates*, 9 N. Y. 2d 242, 213 N. Y. S. 2d 74.)

Upon the foregoing, and pursuant to the provisions of Section 1234 of the Civil Practice Act, the motion of the Attorney General to dismiss the application is granted, and the petition is dismissed; and the petitioner shall remain in the control of the Director of the Rochester State Hospital, until the further order of the Court, or until other proper procedural requirements are met.

Submit order accordingly.

September 8, 1961.

DOMENICK L. GABRIELLI,
Supreme Court Justice.

Opinion.

COURT OF APPEALS,

STATE OF NEW YORK.

4 No. 162

THE PEOPLE &c., *ex rel.* EDWARD STOCK,

Appellant,

vs.

CHRISTOPHER F. TERRENCE, M. D., Director, Rochester State Hospital,

Respondent.

(and another proceeding.)

DESMOND, Ch. J.:

These are two habeas corpus proceedings, heard separately and dismissed after the hearings by two Special Term orders, both of which were unanimously affirmed by the Appellate Division on the same day. The appeal here is taken as of right from both orders on the assumption that a constitutional question is involved (Civ. Prac. Act, §588, subd. 1A). We may treat relator's two habeas corpus petitions as if they were one pleading in which it is alleged that his confinement and restraint in a State mental hospital is violative of his constitutional and other rights in that no "final order" (see Mental Hygiene Law, §74, subd. 7) has been made or entered, or, if there is such an order, in that it has been made without notice to relator. These are the only grounds alleged for habeas corpus and there is no mention in the petitions of relator's present condition of mental health.

Since June 12, 1959 relator has been a patient first at Buffalo State Hospital and now at Rochester State Hospital. On that date he was committed as a mentally ill person, certified to be such by two physicians, by a County Court order made pursuant to section 74 of the Mental Hygiene Law after notice of application therefor had been served personally on relator and on his mother (see §74, subd. 3). The County Court, as permitted by subdivision 4 of section 74, ordered that relator be committed to Buffalo State Hospital "for observation and treatment for a period not exceeding 60 days." Another paragraph of that "order of certification" incorporating subdivision 7 of section 74 directed that "upon the filing of a certificate of the director or the physician in charge or the designated medical officer of the institution, in the office of the County Clerk, prior to the expiration of 60 days from the date of this order, that said alleged mentally ill person is in need of continued care and treatment, this order shall then become final." "Final" means (Mental Hygiene Law, §46, subd. 7) "that the patient shall thereafter remain in such institution, or any other institution, to which he may be transferred, until his discharge" pursuant to law.

On July 28, 1959, somewhat less than 60 days after the order of certification had been entered and relator received at the State hospital, a medical officer of the hospital, presumably designated for that purpose, filed in the Erie County Clerk's office a subdivision 7 certificate stating that relator was in need of continued care and treatment. Relator received no notice of the filing of that paper. In October, 1959, he was transferred from the Buffalo institution to Rochester State Hospital where he is still a patient. In a return to one of the habeas corpus writs the director of the Rochester hospital informed the court that relator "is still in my custody, and is still mentally ill".

To repeat, relator did not sue out these writs to get a discharge on the ground that he is not mentally ill, a

procedure which is always open to him, in addition to the remedies set up by the Mental Hygiene Law (see *Matter of Coates*, 9 N. Y. 2d 242, 247). Unlike petitioner Coates in the proceeding just cited, relator is not availing himself of the right given by section 76 of the Mental Hygiene Law. Section 76 describes a proceeding to set aside the section 74 proceedings of June, 1959, by obtaining "a rehearing and a review of the proceedings already had and of such certification, upon a petition to a justice of the supreme court other than a justice making such certification, who shall cause a jury to be summoned * * * and shall try the question of the mental illness of the person so certified". Relator takes his stand on the single fact that he received no notice of the medical officer's July 28, 1959 certification as a result of which his temporary status became permanent or "final". He asserts that the lack of such notice for nearly three years has in actual effect and in theory of law deprived him of his right to the review of the proceedings under which he was committed and pursuant to which he is still being restrained of his liberty. We, however, agree with the courts below. Relator has shown no violation of any right under the Federal or State Constitutions or under the Mental Hygiene Law as interpreted by us in *Matter of Coates* (9 N. Y. 2d 242, *supra*).

Although the *Coates* opinion (*supra*) examines into the whole meaning and effect of sections 74 and 76 of the Mental Hygiene Law, the question directly posed by the *Coates* appeal was: "Does section 76 provide for adequate notice to appellant that the 20-day period, in which she must make her demand for a jury trial, has commenced to run?" We read section 76 to mean that the 20-day limitation period for demanding a review of a section 74 commitment does not begin to run until the patient has been served with notice of the "need for continued care and treatment" (section 74) certification. We held in Coates that due process requirements were satisfied by the statute as so read. Petitioner Coates got

no notice of such certification, so her right to a review including a jury trial was still existent. The same is true of this relator but he prays the court not for such a review but for immediate release on a theory that his confinement, originally lawful, became unlawful for failure to notify him that by force of the medical director's certificate of July 28, 1959, the order which in first effect sent him to the mental hospital for a 60-day (or less) period of observation and treatment had become final in the sense that it required that he remain in the hospital for an indefinite time until discharged. Consistently with the *Coates* decision, we hold that the absence of notice to relator of the July 28, 1959 medical director's certification kept alive relator's right to a section 76 review. But we hold, too, that absence of such notice had no effect on the validity, already established by the County Court order, of relator's continued detention after and by reason of the medical director's official certificate. The notice given to relator and to his mother of the original (June 12, 1959) application to the County Court was warning enough, constitutionally and under the statute, not only of the impending temporary commitment but that the temporary terms of the order would become final if and when the medical director should file a certificate that continued care and treatment were essential.

The orders should be affirmed, without costs.

Orders affirmed. Opinion by Desmond, Ch. J. All concur.

Remittitur.

COURT OF APPEALS.

State of New York, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 12th day of June in the year of our Lord one thousand nine hundred and sixty-two, before the Judges of said Court.

Witness,

The Hon. Charles S. Desmond, Chief Judge, Presiding.
Raymond J. Cannon, Clerk.

Remittitur June 12 1962.

The People &c., *ex rel.* Edward Stock,

Appellant,

vs.

Christopher F. Terrence, M. D., Director of Rochester State Hospital,

Respondent.

(and another proceeding.)

Be It Remembered, That on the 17th day of April in the year of our Lord one thousand nine hundred and sixty-two, Edward Stock, the appellant in these causes, came here unto the Court of Appeals, by Whitbeck & Holloran, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the orders of the Appellate Division of the Supreme Court in and for the Fourth Judicial Department. And Christopher F.

Terrence, M. D., Director of Rochester State Hospital, the respondent—in said causes, afterwards appeared in said Court of Appeals by Louis J. Lefkowitz, Attorney General.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard these causes argued by Mr. Vito J. Cassan, of counsel for the appellant, and by Mr. Joseph J. Rose, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the orders of the Appellate Division of the Supreme Court appealed from herein be and the same hereby are affirmed.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said orders be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereto, &c.

GEARON KIMBALL
Deputy Clerk of the Court of Appeals
of the State of New York.

Court of Appeals, Clerk's Office
Albany, June 12, 1962.

(Seal.)

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said causes in the Court of Appeals, with the papers originally filed therein, attached thereto.

GEARON KIMBALL
Deputy Clerk.